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THE CORPORATION TRUST COMPANY AND AFFILIATED COMPANIES

The policy of The Corporation Trust Company in all matters relating to the incorporation, qualification, statutory representation and maintenance of corporations, is to deal with members of the bar, exclusively.

Consolidation and Merger in Delaware and Maryland

The laws of Delaware and Maryland have been amended this year to permit, in each state, the consolidation and merger of domestic corporations with corporations of other states, provided the laws of such other states also permit the consolidation or merger. Delaware and Maryland had previously allowed the consolidation or merger of domestic corporations only in either state. The amendments were effected in Delaware by Laws of 1935, House Bill No. 234, effective April 18, 1935, and in Maryland by Laws of 1935, Chapter 551, effective June 1, 1935.

Index to Volume XI of The Journal

An Index to Volume XI of The Corporation Journal (18 monthly issues—October, 1933 to June, 1935), has been compiled and printed, Journal size. As The Journal reports the outstanding Corporation Law cases, the Index is a most convenient list of the more important cases of this type decided during the past two years. Copies will be furnished, without cost, upon request.

Raymond Kenway

President.

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The Corporation Journal is published by The Corporation Trust Company monthly, except in July, August, and September. Its purpose is to provide, in systematic and convenient form, brief digests of significant current decisions of the courts, and the more important regulations, rulings or opinions of official bodies, which have a bearing on the organization, maintenance, conduct, regulation, or taxation of business corporations. It will be mailed regularly, postpaid and without charge, to lawyers, accountants, corporation officials, and others interested in corporation matters, upon written request to any of the company's offices (see next page).

When it is desired to preserve The Journal in a permanent file, a special and very convenient form of binder will be furnished at cost ($1.50).

Contents for October

The New State "Compensating Taxes"

EDWARD ROESKEN

Retail dealers operating in states imposing sales taxes have pointed out that a consumer, in order to avoid the sales tax, may go into a neighboring state not having a sales tax and there purchase goods, tax-free, which he otherwise might have purchased in the state levying the tax. To meet this situation, by endeavoring to reduce instances of the out-of-the-state purchase of property, three sales-tax states have levied "compensating taxes" upon property so purchased and brought within their borders, the rate being the identical rate which is applicable to retail sales in these states.

Washington has such a 2% "Compensating Tax,"[1] levied by the act imposing its 2% retail sales tax, to be collected "for the privilege of using within this state any article of tangible personal property purchased subsequent to April 30, 1935." This tax does not apply "in respect to the use of any article of tangible personal property, the sale or use of which has already been subjected to a tax equal to or in excess of that imposed by this title, whether under the laws of this state or some other state of the United States."

California has covered much the same ground by means of the enactment of its "Use Tax Act of 1935,"[2] which levies an "excise tax" on the "storage, use or other consumption in this state of tangible personal property purchased from a retailer on or after July 1, 1935 for storage, use or other consumption in this state at the rate of three per cent of the sales price of such property." This tax does not apply to property subjected to the California 3% retail sales tax.

Oklahoma has levied a 1% tax against goods "brought into the state by any consumer" on which its sales tax has not been paid; "provided, said goods, wares and merchandise have terminated their movement into the State of Oklahoma and the original package in which they were imported has been broken and they have been within the confines of the State of Oklahoma for a period of more than twenty-four (24) hours prior to their consumption by the importer thereof." In addition, Oklahoma has imposed a license tax "upon all salesmen and solicitors whose stock of goods, wares and merchandise are located without the State of Oklahoma and on which the 'Oklahoma Consumers' Tax' is not paid before delivery to the consumer based upon one (1%) per cent of the fair market value of the goods, wares and merchandise sold to consumers within this State, by the solicitors or salesmen."[3]

[1] Laws of 1935, Chapter 180, Title IV. Held constitutional by the Washington Supreme Court, August 28, 1935, in *Vancouver Oil Company v. H. H. Henneford et al.*

[2] Laws of 1935, Chapter 361.

[3] Laws of 1935, House Bill No. 440, Section 4(j) and (k). Constitutionality attacked in *The Texas Company v. Tax Commission*, pending in the District Court of Oklahoma County, Oklahoma.

Domestic Corporations

Delaware.

Arrears of cumulative dividends may be wiped out by amendment. An amendment was adopted to change preferred stock, "Class A stock," into a larger number of shares of common stock. Besides eliminating the dividend preference of the old "Class A stock" with respect to the future, the amendment involved the wiping out of past accumulated dividends. Dissenting stockholders filed a bill asking that the amendment be decreed void only in so far as it purported to make the change *without paying the accumulated dividends*, and that the plaintiffs be decreed to be entitled to be paid all accumulated dividends before payment of any dividends to the holders of common stock.

The Chancery Court for Kent County held that, under Sec. 26 of the General Corporation Law as amended in 1927, the arrears of cumulated dividends could be wiped out by amendment. It was conceded by the plaintiffs that the right to a preference in its future operation may be lawfully altered, according to the decision in *Morris v. American Public Utilities Co.*, 122 Atl. 696 (1923). However, in that case it was decided that under the then existing law a corporation could not so amend its charter as to destroy the accrued right of preferred stockholders to be paid all accumulated dividends in arrears at the date of the amendment before any dividends could be paid on existing junior stock. In the present case the court holds that the 1927 amendment of Sec. 26 was purposely adopted to obviate the consequences of the *Morris* case. Sec. 26 was amended to permit corporations to amend their certificates of incorporation, inter alia, "by changing the * * * preferences, or relative, participating, optional or other special rights of the shares." This amendment, in view of the *Morris* case which provoked it, was intended to embrace more than "preferences," and authorized amendments destroying the right of a cumulative preferred stock to be paid its arrearages of dividends, provided the requisite number of shares of the affected stock consented. Sec. 26 in its present form, when it is impliedly written into a corporate charter, is tantamount to an agreement by the stockholders to give to a majority of a class of stockholders the right to cancel obligations which the entire class might hold against the corporation. It was held further that Sec. 26 as it has existed since the 1927 amendment was available to the corporation in this case although it has been incorporated in 1925. As decided in *Davis et al. v. Louisville Gas & Electric Co.*, 142 Atl. 654, the Legislature has power by amendment of the Act, to enlarge the scope of subjects which corporations theretofore existing might themselves alter by self amendment of their own charters, so as to affect changes which, when the corporations were created, they could not effectuate against the will of an objecting stockholder. *Keller et al. v. Wilson & Co., Inc.*, Chancery Court, Kent County, May 24, 1935.

In the case of *Herman Saperstein v. Wilson & Co., Inc.*, decided in the Court of Chancery for New Castle County, Delaware, May 24, 1935, the complainant sought to restrain Wilson & Co., Inc., the defendant in the case digested above, from proceeding to carry out or consummate the amendment of its certificate of incorporation and from paying dividends under the circumstances outlined above. An injunction was denied by reason of the conclusions reached in *Keller et al. v. Wilson & Co., Inc.*, above, decided on the same day. Herman Cohen, of Cohen and Cohen, for complainant. Hugh M. Morris and Edwin D. Steel, Jr., for defendant.

Michigan.

Corporation failing to file annual report cannot maintain suit. A Michigan corporation brought this action to recover certain amounts allegedly due it and claimed to be in the hands of the defendant. The corporation having failed to file its annual report for the year 1933 and this suit having been instituted in 1934, it was asserted that section 87, Act No. 96, Public Acts 1933, providing that the corporate powers of a corporation shall be suspended in the event of its default in filing its annual report, until such report shall be filed, applied, and consequently the corporation's powers to institute and maintain a suit were, therefore, suspended, and this action could not be maintained. The Supreme Court of Michigan accepts this contention and says that the holding of the trial court, based on the statute above referred to, that the corporation could not maintain the suit because of its failure to file the annual report, was correct. *Meldman Cartage Co. v. Freuhauf Trailer Co.*, 259 N. W. 905. Louis B. Ver Wiebe, of Detroit, for appellant. Stevenson, Butzel, Eaman & Long, of Detroit (Victor W. Klein, of Detroit, of counsel), for appellee.

Action by receiver on promissory note given in payment of shares of stock. The duly appointed receiver of a domestic corporation sued to recover on a promissory note given in part payment for certain shares of stock, the note having been found in the corporation's safe deposit box. The maker of the note was one of the incorporators and was the treasurer of the company. The suit was defended on the ground that the note was given for shares of stock contrary to the provisions of the applicable statute and therefore void; and on the further ground that the note evidenced a stock subscription agreement and that none of the requisite steps preliminary to recovering for unpaid corporate stock subscriptions had been taken. The Supreme Court of Michigan, however, holds that, under the statutory provisions here involved, shares of stock may be issued for which promissory notes are given, provided the shares shall not be delivered until the notes are fully paid. On the second point the court says: "The articles of association stated, in effect, that the amount at which the stock had been sold was paid in. This action is not upon unpaid stock subscriptions, but upon a note of the defendant which he admits was given in part payment

of the stock to which he was entitled. The note was accepted by the corporation as payment and deposited by it in its safety deposit box in the trust company, and, when turned over to the plaintiff as receiver of the corporation, it became a capital asset in his hands; a debt, due by the defendant to the corporation, which it was the receiver's duty to collect and distribute the proceeds thereof among the creditors entitled thereto." *Abrin v. Equitable Trust Co. et al.*, 261 N. W. 85. Griffin, Heal & Emery, of Detroit (Thomas V. Locicero, of Detroit, of counsel), for appellant. Morris Garvett, of Detroit, for appellee.

Minnesota.

Blue Sky Law; charter amendment reducing par value of shares. The H. D. Hudson Manufacturing Company, a domestic corporation, amended its articles of incorporation, the effect of such amendment being to reduce the par value of its shares from $100. per share to $10. per share. The corporation then issued to its various stockholders certificates for 10 shares of new stock for each share of the $100. par value of old stock. Ten shares of the new stock had the same value as one of the old shares. The Supreme Court of Minnesota, holds that this was not a sale of shares of the new stock, and consequently the transaction did not come within the law requiring registration of the shares before the exchange was made. The authorized capital stock of the company was also increased by the amendment and the corporation sold thirty shares of this increased stock to one of its stockholders. The court finding that there had been no commission of brokerage expense in connection with the sale further holds that such sale was exempted from registration and valid. *Mertz et al. v. H. D. Hudson Mfg. Co.*, 261 N. W. 472. Fowler, Carlson, Furber & Johnson and Ralph H. Comaford, all of Minneapolis, for appellant. Grannis & Grannis, of South St. Paul, for respondent.

New Jersey.

Power of president to retain accountant to make monthly audit of books. In October, 1932, the president of the Eisler Electric Corporation engaged plaintiff, an accountant, by letter to "continue" to audit the books of the corporation and to make monthly reports, the agreement, "to continue in effect until December 31, 1936." Sometime later the president was succeeded by another, and difficulties arising between the accountant and the corporation, his services were dispensed with and this action was brought to recover for services rendered. It was claimed that the contract was ultra vires, was never authorized or ratified by the corporation, and that it was not within the scope of the president's official duties to enter into such an agreement. The Court of Errors and Appeals of New Jersey, in passing on the points raised, says that if the former president had the authority he alleges, which is not disputed, he had the

power to engage the accountant to make the audits. "It is well settled that when, in the usual course of the business of a corporation, an officer has been allowed to manage its affairs, his authority to represent the corporation may be implied from the manner in which he has been permitted by the directors to transact its business. It is undisputed that the plaintiff was under contract with the defendant company since April, 1930, and it is not denied that the contracts entered into prior to the one now involved were made on behalf of the company by the former president, as he alleges." *Besser v. Eisler Electric Corporation,* 178 A. 750. Stuhr & Vogt, of Hoboken, for appellant. Hannoch & Lasser, of Newark, for respondent.

By-law providing for cumulative voting ineffectual where charter does not authorize such voting. The petitioners in the instant case were nominated as directors of a New Jersey corporation, and assert that under a by-law provision providing for cumulative voting they were entitled to have shares so voted for them at the annual meeting. The chairman of the meeting ruled that, there being no provision for cumulative voting in the certificate of incorporation, the provision in the by-laws was ineffective, and therefore, such voting could not be indulged in. The Supreme Court of New Jersey in considering the point involved says that the only provision for cumulative voting is contained in section 36a of the Corporation Act, and this section requires that the certificate of incorporation shall provide for such voting. There was no common law right to cumulative voting—it exists only by virtue of the statute and may be exercised only in accordance with the statute. Therefore, "the by-law in question was ineffective to confer upon the owners of stock in the corporation the privilege of cumulative voting, because not provided for in the charter of the corporation as required by statute." *In re Brophy et al.,* 179 A. 128. Lionel P. Kristeller and Saul J. Zucker, both of Newark, for petitioners. Endicott & Endicott, of Atlantic City, for respondents.

New York.

State statute relative to inspection of stock books not applicable to national bank. This action was brought to recover penalties under the provisions of section 10, of the Stock Corporation Law for refusal to permit the inspection of the stock book of a national bank. Certain officers and directors were also made parties because of their custody and control of the stock book, and their actual refusal to permit such inspection. The New York Supreme Court, Appellate Division, (Second Department) says, in considering this question, that national banks are subject to state laws in respect to their affairs unless such laws are in conflict with the paramount laws of the United States. Section 40, of the National Banking Act (12 USCA, sec. 62) provides for the inspection of the stock book of a national bank by its stockholders, but contains no provision for any particular remedy nor for any penalty for the refusal of the

bank or its officers to allow such inspection. This statute, as well as the provisions of section 10 of the Stock Corporation Law, is declaratory of a common-law right, and the right of a stockholder to so inspect the stock book may be enforced by mandamus. Therefore, "the provision for a penalty, contained in section 10 of the Stock Corporation Law is in conflict with the federal statute, and cannot, therefore, be enforced against the bank. In other words, the Congress of the United States has legislated on the subject of the duty of a national bank to permit the inspection of its stock records by its stockholders. It has not, however, provided any particular remedy by which an aggrieved stockholder may enforce this duty, leaving him to the appropriate legal remedies existing for that purpose." It follows that since section 10 cannot be enforced against a national bank, it cannot be enforced against officers and directors. *Lauer v. Bayside National Bank et al.*, 280 N. Y. S. 139. Jonas Himmelfarbe, of Flushing, L. I., for appellant. Charles W. Froessel, of Jamaica, L. I., for respondents.

Foreign Corporations

Georgia.

Service of garnishment on resident agent of foreign corporation held valid. The Jewel Tea Company, a foreign corporation, was engaged in selling groceries to customers at their homes in a city in Georgia, doing so by shipping the goods from outside the state direct to its resident agent in the state, who then delivered the goods from a motortruck to the corporation's customers. The goods were sold at prices fixed by the corporation and the agent was paid a base salary and commissions on sales. The agent also reported and remitted collections periodically to the office of the company outside the state. The truck from which the goods were sold was provided by the corporation with the corporation's name conspicuously printed upon it, and the company kept the truck in repair and paid for the gasoline and oil used in its operation. Under the above facts the Court of Appeals of Georgia holds that the corporation is doing business in the state and that the agent so engaged in selling the goods is an agent of the corporation in charge of the business of the corporation in the state and county in which the goods are sold, so that service of garnishment upon the corporation may be perfected by service upon the agent thus in charge of the business. *Jewel Tea Co. v. Patillo et al.*, 178 S. E. 925. Abrahams, Bouhan, Atkinson & Lawrence, of Savannah, for plaintiff in error. Paul E. Seabrook, of Savannah, for defendants in error.

Indiana.

Fact that plaintiff, an unlicensed foreign corporation, has reached a condition where it cannot qualify may be pleaded as a defense. In a suit involving foreclosure proceedings, it was specifically al-

leged in the answer that the plaintiff, an unlicensed foreign corporation, had ceased to do business as a corporation and its assets and affairs had been taken over by another corporation; further, that the plaintiff had ceased to function and operate and could not therefore now comply with the Foreign Corporation Act of Indiana. The Appellate Court of Indiana refers to *Lowenmyer v. National Lumber Co.*, 71 Ind. App. 458, 125 N. E. 70, and *Burroughs v. Southern Colonization Co.*, 96 Ind. App. 93, 173 N. E. 716. In the *Lowenmyer* case it was held that where a foreign corporation has failed to comply with a statute giving it the right to do business in the state, and becomes insolvent, a receiver or trustee, appointed to administer its affairs, cannot maintain an action brought in the state on a claim arising therein, and that, where such a corporation reaches a state that prevents a compliance with the statute, the facts with reference to its noncompliance and condition may be pleaded in bar to the action. The *Burroughs* case reiterated the rule that where it is alleged that a foreign corporation had not complied and could not qualify in the state, that this is an effective answer in bar. The court says that since it was alleged that the plaintiff "has ceased to operate and function as a corporation and that it cannot now comply with that act, this was a proper plea in bar, and the court erred in striking out this paragraph of answer." *Barnett et al. v. Central Republic Bank & Trust Co. et al.*, 196 N. E. 369. J. D. Kennedy, of East Chicago, and Fred Barnett, of Hammond, for appellants. Tinkham & Galvin, of Hammond, for appellees.

Kentucky.

Collection of data by an unlicensed foreign corporation for defense of action held not to subject it to service of process. A resident of Kentucky brought this action against the Ritter-Burns Lumber Company, an unlicensed foreign corporation, by service on an alleged officer or agent of the corporation who was at the time of service in the state collecting data to be used in the defense of claims asserted in the present litigation. In further support of the jurisdictional question, an attempt was made to establish such identity between the foreign corporation and a subsidiary corporation, organized under the laws of Kentucky and doing business in the state, so that the subsidiary company could only be regarded as a mere agent or instrumentality of the foreign corporation engaged in carrying on its business in the state. The United States District Court (Eastern District, Kentucky) holds that the collection of data for use in the suit was not sufficient to bring the corporation within the state; and further finding that the corporate existence of the subsidiary was maintained separate and distinct from the parent, that its books and records were separately kept, and that transactions of the two corporations, respectively, in carrying on their lines of business, were handled as though they were two wholly independent corporations, further holds that the facts do not show that the foreign corporation was engaged in carrying on business

"What would we do—how would we get along—without The Corporation Trust Company?" asked a New York corporation lawyer recently.

"Many a time in my law-clerkship and in my early days of practice," he continued, "I have spent days at a time in the library looking up and making notes of statutes and precedents in connection with the incorporation or qualification of one single corporation.

"We just couldn't handle the business we handle today if we had to go back to those horse and buggy methods.

"Nowadays if I want to organize a company in Cal-

ifornia—or in Dakota—or in Texas—or anywhere else—all I have to do is to 'phone The Corporation Trust Company for the requirements, forms and data I need to work with, and in an hour's time I can go ahead and complete the job!

"I honestly don't know what we would do if we were now to be deprived of this resource of the modern corporation lawyer."

If an attorney has all papers ready for incorporation of a company, or for its qualification as a foreign corporation, no matter in what state or territory of the United States, or what province of Canada, we will take them at that point and see that every necessary step is performed—papers filed, copies recorded, notices published, as may be required in the state, statutory office established and thereafter maintained; in case of new companies, incorporators furnished, meeting held, directors elected, minute book opened.

If, before drafting the papers, you wish to study carefully the question of the best state for incorporation of your client's particular business, the most suitable capital set-up or the soundest purpose-clauses, or the most practicable provisions for management and control, we will bring you precedents from the best examples of corporation practice on which to formulate your plans, or, if you desire, will draft for your approval certificate and by-laws based on such precedents.

If uncertain as to necessity of a client's qualifying as a foreign corporation in any state, we will, upon submission of the facts, bring you digests (with citations) of leading court decisions showing the attitude of each state involved on the kind of business transacted by your client.

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so as to subject itself to local jurisdiction at the time service of process was made. *Walker v. Ritter-Burns Lumber Co.*, 10 F. Supp. 804. Jouett & Metcalf, of Winchester, for plaintiff. Craft & Stanfill, of Hazard, and Rolla D. Campbell, of Huntington, W. Va., for defendant.

Michigan.

Furnishing plans and designs and supervision by foreign engineering corporation held interstate commerce; qualification unnecessary. The assignee of an engineering contract entered into between an engineering corporation and the city of Bay City, Michigan, brought this suit against the city to recover on quantum meruit and for breach of contract. It appeared that the engineers agreed with the city to design and supervise the erection of a complete waterworks and all necessary accessories. The clerical work, the drawing of the plans, and the details of map-making, etc., were all carried on in Cleveland. The engineers did not contract to construct the plant, furnished no material, and did not do the actual construction. On the question of whether these acts required the corporation to qualify in Michigan, the United States Circuit Court of Appeals (Sixth Circuit), says that the interstate features were recognized in the agreement. A resident engineer in Bay City was provided for who would keep in touch with the home office through a system of daily reports, and further that representatives from the main office should visit the work for instruction, inspection, and consultation. The agreement contemplated that the detailed planning should be done in Ohio and that there should be constant interstate communication. The court further says that there was no indication of a purpose to carry on business in the state, and while the work extended over a long period the transaction was isolated. "The integral connection of the work in Michigan with the work in Ohio is emphasized by consideration of the function of the plans sold, of their complexity, of the necessity of their application with mechanical skill and precision, in order that the desired result of the contract, the waterworks which had been planned, might be achieved." The transaction, therefore, being interstate commerce, the right of action was not barred by failure of the corporation to qualify. *Bay City v. Frazier*, 77 F. (2d) 570. A. W. Black and J. L. McCormick, both of Bay City, for appellant. Edward S. Clark, of Bay City (Clark & Henry, of Bay City, on the brief), for appellee.

Mississippi.

Effect of dissolution in home state on status of foreign corporation in another state. One question, among others, presented in the garnishment proceedings here involved had to do with whether a judgment was void because, when rendered, the garnishee, a New York company, which had been doing business in Mississippi, had been dissolved and was in the hands of receivers. Reliance was placed

on the common-law principle that the dissolution of a corporation meant its death and that it could neither sue nor be sued. The Supreme Court of Mississippi, however, says that "the trouble about that position is that the common-law rule has been changed by section 4171, Code 1930, which provides that, if the charter of a corporation has expired or been annulled, it may nevertheless be continued as a body corporate for the term of three years thereafter, for the purpose of suing and being sued and of enabling it to close up its affairs, to sell and convey property and to divide its assets," and that this statute applies to foreign corporations doing business in the state as well as domestic corporations. "Of course, only the assets of a foreign corporation located in this state could be affected. Section 4166, Code 1930, subjects foreign corporations doing business in this state to suits here. Authorities are ample to support the position that a foreign corporation dissolved and dead in the domicile of its origin may be deemed alive in a foreign state, so as to afford remedies to its own citizens against property within its own jurisdiction." *Rawlings v. American Oil Co.*, 161 So. 851. White & Morse, of Gulfport, Roberson & Cook, of Clarksdale, and Lotterhos & Travis, of Jackson, for appellant. Hannah & Simrall, of Hattiesburg, and Welch & Cooper, of Laurel, for appellee.

New Mexico.

Statutory agent of foreign corporation having left state, service on Secretary of State held good; corporation not notified; default judgment taken. In an action against a foreign corporation, the statutory agent having left the state and no other named to replace him, service was made upon the Secretary of State. It conclusively appeared that the Secretary of State did not mail a copy of the complaint and summons to the corporation as required by statute, and the corporation failing to appear, a certificate of default was issued and judgment rendered against it. Some six months after judgment a motion was made to vacate and set it aside, and the trial court, holding that there had been no valid service on the corporation, set aside and vacated the judgment against it. Upon appeal from this order, the Supreme Court of New Mexico reverses and remands, holding the service upon the company good. The court says that the Legislature made it plain that the service upon the Secretary of State is the effective service and it is not the notice by the Secretary to the corporation that renders it effective; and although the statute requires the Secretary of State to forward the papers by registered mail to the corporation's registered office, those acts are not essential to jurisdiction. The court says that the forwarding of the papers served to the company in another state gives no aid to the jurisdiction of the court over the person. The Secretary is directed to forward the papers so that the company may have notice that a suit has been commenced against it by service upon him as the designated agent of the corporation. This is a duty which the Secretary of State owes the company, not the person bringing the

suit. The court further remarks that the corporation, by appointing a new agent when the existing agent left the state or absented himself, could have assured itself of notice of any action, and further, that the statute informed the company that if it did not have a resident agent the Secretary of State would, by law, become its agent for the purpose of service. *Silva v. Crombie & Co.*, 44 P. (2d) 719. Lake J. Frazier, and G. L. Reese, Sr., both of Roswell, for appellant. L. O. Fullen, of Roswell, for appellee.

New York.

Maintenance of office by foreign corporation; service on local agent held good. Service of process in these proceedings against a foreign corporation was made upon the corporation's local manager and the question presented is the validity of such service. It appeared that the corporation had opened an independent place of business in New York leasing a suite of offices in charge of an Eastern manager. The corporation also employed three salesmen, a bookkeeper, clerks and typists. The name of the company was on the office door and its name was likewise listed in the telephone directory. It advertised extensively by circulars and radio, informing the public that it maintained a branch office in the city of New York. Merchandise in large quantities was sold and delivered by the corporation directly through this branch establishment, and some fifty-six firms were listed as its customers in New York. It maintained a warehouse in New York where large quantities of merchandise were constantly kept for sale. On the facts presented the United States Circuit Court of Appeals, (Second Circuit) holds that there was a continuous, not a casual, selling in New York, that the service on the manager was valid, and that the corporation was within the state in the sense that it could be sued and suit maintained against it in the Southern District of New York. *Frank MacMonnies Corporation v. Sunical Packing Co.*, 75 F. (2d) 467. Nathan Vidaver and David Bernstein, both of New York City, for appellant. Manheim Rosenzweig, of New York City, for appellee.

Pennsylvania.

Courts will not interfere with internal affairs of a foreign corporation. These proceedings involve a stockholder's bill in equity against a foreign corporation in which were joined the latter's directors and all shareholders of the corporation's predecessor. The substance of the complaint is failure of the directors to institute proceedings against the predecessor's shareholders to recover for alleged misrepresentations by the latter as to the amount of indebtedness of the prior corporation, these statements being allegedly made during the course of negotiations which resulted in the present company's formation under a plan whereby it took over the entire assets of the old company and assumed its obligations. The Supreme Court of Pennsylvania disposes of the matter as follows: "The

questions here presented were raised and passed upon by this court in *McCloskey v. Snowden*, 212 Pa. 249, 61 A. 796, 108 Am. St. Rep. 867. We there held that to grant relief such as plaintiff now seeks would be to interfere with the internal affairs and management of the company, and that in the case of a foreign corporation this would not be done. We are not disposed to depart from our previous holding. It is well established by our decisions that courts of equity of this commonwealth may very properly refuse to exercise visitorial powers with respect to corporations organized under the laws of our sister states. The fact that the corporate defendant's principal place of business and its visible tangible property are within our borders is immaterial." *Kelly v. Brackenridge Brewing Co., Inc., et al.*, 178 A. 487. Paul Ginsburg, of Pittsburgh, for appellant. James R. Orr, Louis Abramson, and Morris L. Marcus, all of Pittsburgh, for appellees.

Taxation

Kentucky.

Organization tax on capital stock; several increases after reductions. The Louisville Trust Company was organized with an authorized capital of $1,750,000 and paid the organization tax on that amount. In 1931, the charter was amended and the authorized capital reduced to $200,000. Later in 1931, the capital was increased from $200,000 to $1,000,000, and in January, 1934, a further amendment was adopted increasing the capital from $1,000,000 to $2,000,000. After this last amendment, a copy thereof duly certified was presented to the Secretary of State to be recorded, and at the same time there was tendered the sum of $250. in payment of the tax, this being the sum due on the increase of $250,000 capital over the original authorized capital of $1,750,000. The Secretary of State refused to accept and record the copy of the amended articles unless the sum of $1,000 was paid. The Court of Appeals of Kentucky in connection with the question raised says that here the company paid the organization tax on its original authorized capital stock of $1,750,000. Though it afterwards reduced its capital to $200,000, and then increased it to $1,000,000 and then to $2,000,000, it only increased its original authorized capital stock in the sum of $250,000, and that was the only portion of its authorized capital stock that had not "theretofore borne the tax." This being true, a tax of $250 was due, and no more, and the court did not err in granting the mandamus. *Talbott v. Louisville Trust Co.*, 82 S. W. (2d) 219. Bailey P. Wootton, Atty. Gen., and David C. Walls, Asst. Atty. Gen., for appellant. Gordon, Laurent, Ogden & Galphin, of Louisville, for appellee.

Louisiana.

Franchise tax; inclusion of borrowed capital. In the assessment of a corporate franchise tax for the year 1932, under Act No. 8 of

1932, the corporation having failed to make a report as required, its books were examined by an auditor under authority of the Secretary of State. The statements prepared by the auditor showed total assets of $37,000, capital stock amounting to $3,200, and a past due and accrued indebtedness of $110,000 classified and reported as "borrowed capital." The corporation contended that the inclusion of its past due indebtedness in the assessment was illegal because it imposed a tax on indebtedness rather than capital stock, and that the Secretary of State, having ascertained that the capital stock had no actual value, had arbitrarily assessed a franchise tax on the total amount of the outstanding indebtedness or book borrowed capital. The Supreme Court of Louisiana in holding the tax properly assessed, says that, "Borrowed capital is as much a part of a corporation's capital as are the funds raised by the sale of its stock, its surplus, and undivided profits. Such capital tends to increase a corporation's business and make it profitable. It requires the protection of the state as much as the capital resulting from the sale of a corporation's stock, the accumulation of its surplus and its undivided profits." On the point that the stock was without any actual value, the court remarks that it is sufficient to say that the law allows no deduction for a deficit and requires the tax to be measured as if no loss had occurred. If losses have been so great as to reduce the value of assets below the amount of outstanding indebtedness, the company is insolvent and probably should liquidate. Notwithstanding the deficit, the company is liable for the tax as long as it remains unliquidated and holds its charter. The indebtedness, being in effect borrowed capital, it must be included in measuring the tax to the extent that it exceeds the capital stock, there being no surplus or undivided profits. *State v. Xeter Realty, Limited,* 162 So. 29. Walter F. Marcus, Bert Flanders, Jr., and Fred A. Kullman, all of New Orleans, for appellant. D. M. Ellison and Charles J. Rivet, Sp. Assts. to Atty. Gen., for appellee Secretary of State.

Massachusetts.

Corporate excise tax; allowance as deduction of real estate held in name of nominees. This is an appeal by the Commissioner of Corporations and Taxation from a decision of the Board of Tax Appeals abating certain additional corporate excise taxes assessed to the corporate taxpayer for the years 1926 and 1927. The Commissioner in determining the tax refused to allow as a deduction from the fair value of the capital stock the value of certain real estate within the Commonwealth subject to local taxation in the name of nominees to which the taxpayer asserted title. The Commissioner asserted that the legal title to the real estate was not in the taxpayer and so was not "owned by it" within the meaning of the applicable statute which provides in part that "corporate excess" in the case of a domestic corporation is "the fair value of all the shares constituting the capital stock * * * less the value of:

* * * (a) * * * real estate * * * owned by it within the commonwealth subject to local taxation." It appeared that as a fact that the land was owned by the taxpayer, and that, although standing in the names of others, the taxpayer in each instance held an unrecorded deed and that the property had been bought and paid for by the taxpayer. The real estate was, likewise, subject to mortgage and the taxpayer collected the rents and paid the expenses including taxes and interest. In returns the value of all the real estate was included in its assets and the mortgages thereon in its liabilities. The Board of Tax Appeals granted abatements, holding the Commissioner to be in error in the assessment of the tax. The Supreme Judicial Court of Massachusetts affirms this holding, saying, that "On the facts found and already recited the taxpayer had the equitable title to the real estate in question by virtue of a resulting trust, having paid the entire purchase price. * * * It also held the legal title through unrecorded deeds executed and delivered to it by the straws who appeared by the record to be the owners. * * * In any event the real estate was owned by the taxpayer within the meaning of those words in the governing statute. It follows that abatements are granted in the sums found and allowed by the board of tax appeals." *Commissioner of Corporations and Taxation v. Thayer, Bradley Co.*, 197 N. E. 47. A. V. Harper, of Boston, for petitioner. J. E. Warner, Atty. Gen., and C. F. Lovejoy, Asst. Atty. Gen., for Commissioner of Corporations and Taxation.

Pennsylvania.

Doing business by foreign corporation for purpose of bonus and capital stock tax. A Michigan corporation with its principal place of business in Detroit was engaged in the business of financing the purchase and sale of refrigerators and refrigeration equipment. During the years 1928, 1929, and 1930, the corporation financed such sales by means of bailment leases and trust receipts, and for a short period in 1928, used conditional sale contracts. The Commonwealth of Pennsylvania settled bonus and capital stock taxes for these years and the question presented is whether the corporation was doing business in the state or had capital employed there within the meaning of the statute. The corporation also used a so-called "floor plan," financing the sales by means of trust receipts and the Commonwealth contends that this was in itself doing business. The United States District Court (Pennsylvania) says that under the "floor plan" the financing contract was completed in Pennsylvania. In the first instance the distributor having received an order from a dealer executed a bill of sale to the corporation. The corporation then had a bank in the state act for it to secure payment of the sight draft and the execution of the trust receipt and promissory note by the dealer. The trust receipt and note were made out to the corporation and nothing remained to be done to complete the transaction. Any assignment thereafter of these papers to the corporation to enable it to "accept" them at Detroit could be nothing more

than a fiction. "Thus the acts performed in Pennsylvania under the floor plan were the performance of the function and business of the corporation and not merely incidentals to its corporate existence." The court finding that the company did not maintain an office or salesmen in the state, says, further, that under the bailment lease and conditional sale contract plans, the financing contracts were completed at Detroit where the assignments were accepted, and therefore in that connection the company did not do business in the state. A decree was therefore entered granting partial relief. *Refrigeration Discount Corp. v. Metzger,* 10 F. Supp. 748. Charles H. Hollinger, of Harrisburg, Wiley, Streeter, Smith & Ford, of Detroit, Mich., and Smith, Buchanan, Scott & Gordon, of Pittsburgh, for plaintiff. William A. Schnader, Atty. Gen., and Philip S. Moyer, Deputy Atty. Gen., for defendants.

Washington.

Tax on businesses and occupations held properly imposed on corporation operating in national park. The Ranier National Park Company, a West Virginia corporation, entered into a contract with the Secretary of Interior, by the terms of which the corporation was granted, for a term of twenty years, the right to establish, maintain, and operate facilities for the accommodation and entertainment of visitors to Ranier National Park. The concessions included were the rights to operate and maintain hotels, inns, lodges, camps, playgrounds, and facilities for transportation. The corporation further obligated itself to exercise its rights, "in such manner as the Secretary shall deem in every respect satisfactory and designed to promote the object for which the park was created and established." In the instant case, the corporation challenges the right of the state to collect the tax imposed on businesses and occupations under the state law, claiming that the tax is a license tax which the state cannot collect since the corporation derives its rights from the Government of the United States, and further, that under the contract, it is a governmental agency. The Supreme Court of Washington holds the tax properly imposed, saying that, while the tax is an excise and not a property tax, it is in no sense a license tax. It is not imposed as a prerequisite to entering into, or for the regulation of, business, but solely for revenue purposes. "From such a tax a private corporation is not exempt, even though the rights it exercises may be, in whole or in part derived from the federal government." The court further says that the contract does not make the corporation a federal instrumentality or exempt it from state taxation. It is merely, "a private corporation, operating for profit under a contract with the Secretary of the Interior granting to it certain concessions and privileges within the confines of Ranier National Park," and this fact does not make it a federal agency. *Ranier Nat. Park Co. v. Henneford,* 45 P. (2d) 617. Grosscup & Morrow and Hayden, Metzger & Blair, all of Tacoma, for appellant. G. W. Hamilton and E. P. Donnelly, both of Olympia, for respondents.

CORPORATE MEETINGS HELD

During the past few months meetings of the corporations named below, among many others, have been held at the offices of The Corporation Trust Company.

Coty, Inc.
Dun & Bradstreet, Inc.
United Dyewood Corporation
American Capital Corporation
Northern States Power Company
Alpha Portland Cement Company
Thermoid Company
American Snuff Company
Continental Oil Company
George A. Fuller Company
Blesser Investment Company
The Vulcan Detinning Company
The Commonwealth & Southern Corporation
Allis-Chalmers Manufacturing Company
Coca-Cola International Corporation
Universal Pictures Company, Inc.

Some Important Matters for October and November

This calendar does not purport to cover general taxes or reports to other than state officials, or those we have been officially advised are not required to be filed. *The State Report and Tax Notification Service* maintained by *The Corporation Trust Company System* sends timely notice to attorneys for subscribing corporations of report and tax matters, requiring attention from time to time, furnishing information regarding forms, practices and rulings.

CALIFORNIA—Quarterly Retail Sales Tax Return and Payment due on or before October 15.—Domestic and Foreign Corporations.

GEORGIA—Certified Statement for Registration due on or before November 1.—Domestic and Foreign Corporations.

INDIANA—Quarterly Gross Income Tax Return and Payment due on or before October 15.—Domestic and Foreign Corporations.

IOWA—Quarterly Retail Sales Tax Return and Payment due on or before October 20.—Domestic and Foreign Corporations.

NEW YORK—Supplementary Franchise Tax Return (Form 60CT) due on or before November 30.—Domestic and Foreign Corporations organized or qualified between June 30 and November 1 of current year.

NORTH CAROLINA—Annual Franchise Tax due within thirty days after date of notice.—Domestic and Foreign Corporations.

NORTH DAKOTA—Quarterly Retail Sales Tax Return and Payment due on or before October 20.—Domestic and Foreign Corporations.

RHODE ISLAND—Semi-Annual Report to Chief Factory Inspector due during October and April.—Domestic and Foreign Corporations employing five or more persons in Rhode Island.

WEST VIRGINIA—Quarterly Gross Income Tax Return and Payment due on or before October 30.—Domestic and Foreign Corporations.

The Corporation Trust Company's Supplementary Literature

In connection with the various departments of its business The Corporation Trust Company publishes the following supplementary pamphlets and forms, any of which it is always glad to send without charge to readers of The Journal:

Delaware Corporations. Presents in convenient form a digest of the Delaware corporation law, its advantages, for business corporations, the attractive provisions for non par value stock, and a brief summary of the statutory requirements, procedure and costs of incorporation, completely revised to reflect the changes made by the amendments of 1935.

Amendments to Delaware Corporation Law, 1935. Presents the complete text of the 1935 amendments to Chapter 65 of the Revised Code, all new matters being shown in italics, and repealed matter in brackets, so a complete picture is conveyed of the changes effected, while explanatory comments show the purpose and result of each change.

New Deal Laws of Importance to Corporations—Contains complete text of Securities Act of 1933 as amended by Title II of the Securities Exchange Act of 1934, all matters in the original act omitted in the 1934 amendments being set in brackets, and all new matters added by the 1934 amendments being set in italics; complete text of the Securities Exchange Act of 1934; and complete text of the amendment approved June 7, 1934 to the Bankruptcy Act providing for corporate reorganizations.

The New Bankruptcy Law—Contains, first, the eleven-word amendment approved June 18, 1934 to the original amendment to the Bankruptcy Act approved June 7, 1934 (and published in our pamphlet New Deal Laws described above); second, two examples of voluntary petitions for reorganization under the new provisions; and third, two examples of petitions under the new provisions for appointment of trustees (reorganization sought).

The High Cost of Whistles for Corporations—Benjamin Franklin's classic, "The Whistle," here is shown, by the decisions in actual court cases, to have a very pointed application to some of the policies of some business corporations of our own day. A sixteen-page pamphlet for both laymen and lawyers.

Special Report—The Case Against Corporate Representation by Business Employes. Specific experiences of different corporations with the handling by untrained corporate representatives of such matters as service of process, notices of taxes due, filing of corporation reports, etc.

What Constitutes Doing Business. (Revised to April 15, 1934.) A 198-page book containing brief digests of decisions selected from those in the various states as indicating what is construed in each state as "doing business." The digests are arranged by state, but a Table of Cases and a Topical Index make them accessible also by either case name or topic. There is also a section containing citations to cases on the question of doing business such as to make the company subject to service of process in the state.

Amateur Corporate Representation. A booklet dealing with some of the weaknesses of placing a company's statutory representation in the hands of business employes or others not trained in the matters involved.

When Corporations Cross the Line. A simple explanation of the reasons for and purposes of the foreign corporation laws of the various states, and illustrations of when and how a corporation makes itself amenable to them. Of interest both to attorneys and to corporation officials.

Questionnaire on Business Outside State of Organization. This is a Form for attorney's use in determining when a corporation should be qualified. The questions are those which will usually bring out the points necessary to be considered.